Filed 9/28/09 In re M.M. CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

In re M. M., a Person Coming Under the Juvenile Court Law.	
SAN JOAQUIN COUNTY HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. J. C., Defendant and Appellant.	C060103 (Super. Ct. No. J04543)

Appellant J. C., father of M. M. (the minor), appeals from an order of the juvenile court denying him visitation with the minor after termination of dependency jurisdiction. (Welf. & Inst. Code, §§ 362.4, 364, 395.)[1] Appellant objects to the court's denial of his request to continue the dismissal hearing

[1] Hereafter undesignated statutory references are to the Welfare and Institutions Code.

and seeks reversal of the no visitation order. Finding no abuse of discretion, we shall affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

The San Joaquin County Human Services Agency (the Agency) filed a juvenile dependency petition on behalf of the then newborn minor alleging mother's failure to protect due to a pattern of criminal behavior and drug abuse placing the minor at risk of abuse or neglect. The petition alleged the minor's half sibling, A. M., had previously been adjudicated a dependent of the court and had been removed from mother's custody due to mother's ongoing drug use and failure to reunify.[2] The petition also alleged that appellant, the minor's father, was incarcerated and serving, inter alia, a nine-year prison sentence for domestic violence, stalking and destruction of property against the minor's mother.

Appellant was found to be the minor's biological and presumed father, and submitted to the jurisdiction of the court. The court sustained the allegations in the petition and adjudged the minor a dependent child of the court (§ 300, subd. (b)); however, the minor was not detained, remaining in the mother's care and custody.

Appellant submitted on the Agency's recommendation that he not be provided reunification services given his lengthy

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[2] The mother's parental rights were eventually terminated as to A. M.

criminal sentence. At appellant's request, however, the court ordered that appellant's name be added to the birth certificate.[3]

At the February 2008 status review hearing, the court concluded it was not appropriate to set a visitation schedule with appellant, but left the issue open for further consideration in the future.

The June 2008 status review report stated the mother began a drug treatment program in February 2007, and did well. However, due to physical threats against her, she was moved to another program at a confidential location. She completed all aspects of her case plan and, as of the date of the report, was continuing to live a clean and sober lifestyle. Although appellant remained incarcerated, the mother expressed the need for continued confidential housing to ensure her safety and the safety of the minor. The report also noted that appellant had expressed his desire to "be a part of the minor's life in some way, if possible." Given the absence of any risk factors warranting continued in-home dependency, the Agency recommended that the minor's case be dismissed.

In June 2008, the juvenile court issued an order to transport appellant from prison to the August 2008 "dependent review/contested dismissal" hearing.

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[3] Appellant and the mother later stipulated to change the birth certificate to reflect the minor's last name as a combination of their two names hyphenated.

Appellant was absent from the August 2008 hearing, but was represented by counsel.[4] After considering written evidence including the social worker's report and appellant's written statement, and hearing witness testimony and oral argument, the juvenile court terminated its dependency jurisdiction over the minor, granted the mother sole physical and legal custody and ordered appellant to have no visitation with the minor.

Appellant filed a timely notice of appeal.

DISCUSSION

I.

Denial of Request to Continue Hearing

Appellant claims he had a right to be present and testify at the August 2008 hearing pursuant to the court's discretion under Penal Code section 2625, subdivision (e) and general due process.

"Penal Code section 2625 requires a court to order a prisoner-parent's temporary removal and production before the court only 'where the proceeding seeks to terminate the parental rights of [the] prisoner' under Welfare and Institutions Code section 366.26 or Family Code section 7800 et seq. or 'to adjudicate the child of a prisoner a dependent child.' (Pen. Code, § 2625, subds. (b), (d).)" (*In re Jesusa V.* (2004) 32 Cal.4th 588, 599, italics omitted.) Here, the hearing to

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[4] Appellant's counsel did not object to appellant's absence until well into the hearing, after both the mother and the social worker completed their testimony.

dismiss the minor's dependency case and enter exit orders regarding custody and visitation does not fall into either of those categories. Instead, the hearing fell within the language of Penal Code section 2625, subdivision (e), which gives the court discretion to order the prisoner-parent's attendance. This type of hearing "'may proceed without attendance by the prisoner-parent.'" (*Ibid.*) Conducting the August 2008 hearing in appellant's absence did not violate his statutory rights.

Furthermore, conducting a dispositional hearing in the absence of an incarcerated parent who has expressed a desire to be present does not violate a due process right. "As long as the parent has meaningful access to the court through appointed counsel, there is no due process violation. [Citation.]" (*D. E. v. Superior Court* (2003) 111 Cal.App.4th 502, 513.) Appellant had meaningful access to the court. His attorney appeared on his behalf, called witnesses, cross-examined adverse witnesses, entered appellant's written statement into evidence and argued on appellant's behalf.

Even if appellant had a right to be present, and assuming that right was violated, we apply the harmless error standard to determine if it is reasonably probable that a result more favorable to him would have been reached had he been present in court. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson)*; *D. E. v. Superior Court, supra,* 111 Cal.App.4th at pp. 513-514.) Again, appellant's counsel fully cross-examined the mother and the social worker, called appellant's sister to testify,

submitted appellant's written statement which was admitted into evidence without objection, and argued on appellant's behalf. However, there was significant evidence of appellant's past violence both generally and specifically against the mother and the minor's half sibling. Evidence of appellant's stalking conviction was admitted into evidence. The status review report chronicled appellant's criminal history, which included convictions for theft offenses, assault with a deadly weapon, gang activity and possession of a controlled substance, and at the time of the disposition hearing, appellant was serving what amounts to a life sentence[5] in state prison, a fact which also weighed against visitation being in the best interest of the 18-month-old minor. Given that, as well as the mother's continuing fear of appellant and the need to keep her whereabouts confidential for her safety and the safety of the minor, it is not reasonably probable that a result more favorable to appellant would have been reached in the absence of any error. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) The juvenile court did not deny appellant his statutory or constitutional rights by holding the hearing in his absence.

II.

Denial of Request for Visitation

Appellant contends it was in the minor's best interest to have a relationship with appellant, and the court's denial of

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[5] Appellant is not eligible for parole until 2053.

his request for visitation was error. Appellant urges us to review the juvenile court's order for substantial evidence, arguing the "only support" for the order was "the mother's poor relationship with appellant and the minor's young age."

Contrary to appellant's claim that exit orders are subject to review for substantial evidence, we review these orders for abuse of discretion. Specifically, we will not disturb the juvenile court's determination regarding an exit order in a dependency proceeding unless the court has "'"'exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations].'"'" (*Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285, 300; accord, *In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) "[I]n making exit orders, the juvenile court must look at the best interests of the child." (*In re John W.* (1996) 41 Cal.App.4th 961, 973; see also *In re Jennifer R.* (1993) 14 Cal.App.4th 704, 712.) The juvenile court "must look to the totality of a child's circumstances when making decisions regarding the child." (*In re Chantal S.* (1996) 13 Cal.4th 196, 201.)

Thus, we review the record simply to determine whether the totality of the minor's circumstances indicate the juvenile court's order denying appellant contact and visitation was an "'"arbitrary, capricious, or patently absurd determination [citations][]"'" of the minor's best interests. (*In re Stephanie M., supra*, 7 Cal.4th at p. 318; see *In re Chantal S., supra*, 13 Cal.4th at p. 201.) It was not.

The evidence in this case supports the juvenile court's conclusion that terminating visitation was in the minor's best interest. As previously discussed in part I, appellant had perpetrated acts of violence on both the mother and the minor's half sibling. The mother testified that appellant physically abused her during their relationship, and continued to be violent after they broke up, stalking her and "bust[ing] out the window of [her] car" when she refused to talk to him. On one occasion, appellant broke into her house at 2:30 a.m. and entered the bedroom where she was sleeping with her other daughter. When neighbors called the police, appellant "shoved [the mother] down to the floor, told [her] to answer the door and tell them nothing was wrong." He shoved them both into a closet, leaving an abrasion on the child's face. On another occasion, appellant grabbed the mother as she held the minor's half sibling, splitting the child's lip. Appellant "threw [the child] into the backseat of the car to get her into the car seat before anybody would know what was going on." Among other things, appellant was convicted in 2006 of stalking.

Despite the passage of time between those events and the hearing, the mother remained fearful of appellant and considered him to be "a violent man." She testified she had to involve the police when she learned of threats against her "coming down from [appellant]." Appellant's own sister confirmed that appellant is violent "when he has to be."

The social worker confirmed appellant's desire to be in the minor's life "in whatever capacity he can" and that, while incarcerated, he sent approximately 15 letters to her to be forwarded to the minor. However, the social worker concluded that in-person visits with the minor would be inappropriate given the need to keep the mother's whereabouts confidential, as well as the fact that the minor was "too young to know the significance--understand the significance or benefit from [visitation with appellant] at this point."

It is true that appellant expressed his desire to have a relationship with the minor, requested that her name be changed to include his last name, and regularly sent letters and cards to her while he was incarcerated. However, the safety of both the mother and the minor is of paramount importance in determining what is in the best interest of the child. Based on the testimony and evidence submitted at the hearing, it cannot be said that the juvenile court's order denying appellant visitation was arbitrary, capricious, or patently absurd. (*In re Stephanie M., supra*, 7 Cal.4th at p. 318.)

Appellant suggests the court's order was tantamount to termination of his relationship with the minor. We note, however, that the visitation order may be revisited in the future by the superior court, perhaps once the minor becomes old enough to voice her own opinion or other circumstances change.

The juvenile court did not abuse its discretion in denying appellant visitation with the minor.

DISPOSITION

The orders of the juvenile court are affirmed.

CANTIL-SAKAUYE, J.

We concur:

SIMS, Acting P. J.

NICHOLSON, J.